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Supreme Court of the United States

OCTOBER TERM, 1941

NO. 669

HOWARD HARDESTY, AS RECEIVER OF THE NATIONAL BANK OF FAIRMONT, WEST VIRGINIA,
Petitioner,

VS.

FAIRMONT SUPPLY COMPANY, A CORPORATION,
Respondent.

RESPONDENT'S OPPOSING BRIEF TO SUPPORTING BRIEF INCLUDED IN PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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INDEX

SUBJECT INDEX

	Page
I. Statement	1
II. Questions Presented	2
III. Jurisdiction	3
IV. Summary of Matters Involved	5
V. Decision of Supreme Court of Appeals of West Virginia	8
VI. Argument	10
Point 1—Non-Federal Grounds	10
(A) These Four (4) Deeds, Exhibits "P," (R. 69), "Q," (R. 72), "R," (R. 75) and "S," (R. 77) with Bill of Complaint, are not Ambiguous	10
(B) Whereas Clauses in the Four (4) Deeds	12
(C) The Vice of the Four (4) Deeds	13
(D) The phrase, "Receiver of The National Bank of Fairmont," is Simply *Descriptio Personae* of the Grantee	14
(E) The Law of the Situs of Real Property, *Lex Rei Sitae*, Determines the Validity of the Conveyances thereof, Wherever Made	17
Point 2—Federal Grounds	20
Point 3—The Chancery Cause Presents a Case for Establishment of a Trust for the Benefit of the Bank	22
Point 4—The Case Determined on Certified Record	24
VII. Grounds Relied upon for Disallowance of Writ	25
Conclusion	27
Appendix	30

CASES

	Page
Abilene National Bank v. *Dolly, Com'r.*, 179 F. 461; 32 L. R. A. (N. S.) p. 1065	22
Adams v. *Russell*, 229 U. S. pp. 358, 359	19
Ancient Egyptian Order v. *Michaux*, 279 U. S. pp. 744, 745	19
Ayres v. *Polsdorfer*, Vol. 187 U. S. p. 584	19
Bank v. *Burdette*, 61 W. Va. p. 637	8
Barker v. *Temple Lumber Co.* 12 S. W. (2d) 180	15
Collins v. *Treat*, 108 W. Va. p. 443	11
District of Columbia v. *Wardell*, 32 F. Supp. 771	25
Donahue v. *Rafferty*, 82 W. Va. p. 535	15
Doyle v. *Atwell*, 261 U. S. p. 592	19
First National Bank in St. Louis v. *State of Missouri*, 263 U. S. 640	24
Fowler et al. v. *Coates et al*, 94 N. E. 997	15
Fox Film Corp. v. *Muller*, 296 P. S. pp. 209, 210	19
Greenfield v. *Stout*, 50 S. E. p. 112	15
Griffin v. *Coal Co.* 59 W. Va. 480	11
Hanson v. Blake, Adm'r. 63 W. Va., pp. 560, 561, 562	15
Howard Hardesty, Receiver, etc. v. Fairmont Supply Co., 14 S. E. p. 438	2
Hart et al. v. *Seymour et al.* 35 N. E. 246	15
Honeyman v. *Hanan*, 300 U. S. p. 14	19–26
Hyman v. *Swint*, 94 W. Va. 627, Syllabus 1	14
Inland Waterways Corporation v. *Young*, 60 S. C. R. 646, 647; 309 U. S. 517	27
Irving Trust Co. v. *Maryland Casualty Co. et al*, 84 F. p. 168	19
Johnson v. *Risk*, 137 U. S. p. 300	19
Jones v. Coal Co. 79 W. Va. p. 539	11
Kanenbly et al. v. *Volkenberg et al*, 75 N. Y. S. p. 8	15
Kennedy v. *Gibson et al*, 8 *Wall.* 498, 506	24
Kuhn v. *Coal Company*, 215 U. S. 356	8, 9

	Page
Love v. Love et al, 83 Pac. 201	15
McCoy v. *Shaw*, 277 U. S. p. 303	19
Nagle v. *Herold*, 30 F. Supp. p. 905	21
National Bank v. *Commonwealth*, 9 Wall. 353, 362	21
Paxton v. *Oil Co.* 80 W. Va. pp. 77, 78	11
Pfeiffer v. *Rheinfrank*, 2 App. Div. pp. 574, 575, 576; 37 N. Y. S. pp. 1076, 1077, 1078	15
Sansom v. *Ayer & Lord Tie Co.* 139 S. W. 778	15
Schofield v. *Baker*, 212 F. p. 504	25
State v. Gray, 111 So. 243	15
Strother v. *Nat'l. Bank*, 113 W. Va. pp. 77, 78	11
Swick v. *Rease*, 62 W. Va. 560	23
Thompson & Lively v. *Mann*, 53 W. Va. pp. 435, 436	15
Title Guarantee & Trust Co. v. *Fallon et al*, 91 N. Y. S. p. 497	15
Trahern v. *Woolwine*, 109 W. Va. p. 629	11
Trans. Co. v. *Pipe Line Co.*, 22 W. Va. p. 614	11
Trust Co. v. *Crawford & Ashby*, 69 W. Va. p. 115	15
Uhl v. *Ohio River Railroad Company*, 51 W. Va. pp. 106, 107	11
United States v. *Hastings*, 296 U. S. p. 188	19
Whelan v. *Blankenbeckler*, 87 F. (2d) 82	25
White v. *Leovy, Vol.* 174 U. S. pp. 95, 96	19
Williams Pocahontas Coal Co. v.*Berwind Land Co.*, 76 F. p. 323	L 11
Wittnebel v. *Loughman*, 80 F. (2), p. 224, 9 F. Supp. p. 467	13

TEXTBOOK

18 C. J., Chapter VI, Sec. 240, pp. 275, 276	15

STATUTES

	Page
U. S. C. A. Title 28, C. 9, Sec. 344 (b)	3
U. S. C. A. Vol. 28, Rule No. 35, p. 424	4
U. S. C. A. Title 12, Secs. 198, 199, 200	6, 22, 25, 30, 31
U. S. C. A. Title 12, Secs. 191, 192	25
U. S. C. A. Title 28, Supreme Court Rules, Sec. 7, Rule 11, pp. 400-401	28
W. Va. Official Code 36-1-11	27, 31
W. Va. Official Code 37-1-17	28, 31, 32
W. Va. Official Code 36-1-4	23

Supreme Court of the United States

OCTOBER TERM, 1941

HOWARD HARDESTY, AS RECEIVER OF THE NATIONAL BANK OF FAIRMONT, WEST VIRGINIA,
Petitioner,
vs.
FAIRMONT SUPPLY COMPANY, A CORPORATION,
Respondent.
NO. 669

RESPONDENT'S OPPOSING BRIEF TO SUPPORTING BRIEF INCLUDED IN PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

I.

STATEMENT

The Fairmont Supply Company, a corporation, respondent herein, resists the legal contentions of the petitioner as set forth in his supporting brief, included in his petition addressed to this Court for a writ of *certiorari* to the Supreme Court of Appeals of West Virginia to review the final judgment in the chancery cause recently pending in that Court, styled *"Howard Hardesty, as Receiver of The National Bank of Fairmont, an insolvent national banking association, Plaintiff, v. Fairmont Supply Company, a corporation, Defendant,"* wherein the Supreme Court of Appeals of West Virginia rendered its decision on March 15,

1941, (R. 142), and denied a rehearing thereof on May 19, 1941, (R. 167), and opposes the granting of the prayer of the petitioner's petition filed herein, and assigns legal grounds for such resistance and opposition, stated appropriately in respect to certain subjects discussed in petitioner's petition and supporting brief, which are more or less intermingled together as one paper.

II.

QUESTIONS PRESENTED

(1) Whether under the laws of the State of West Virginia, the three points of law decided in the judgment (R. 142) of the Supreme Court of West Virginia and stated in its syllabus of the case, to-wit:

> "1. Whether a conveyance of land passes a legal or equitable estate therein is determined by the law of the state where the land is situated.
>
> "2. Where a deed conveyed land to 'R. C. Miller, receiver of The National Bank of Fairmont, an insolvent national banking association', legal title to the land described therein passed to the receiver as an individual.
>
> "3. Upon the death of a receiver of an insolvent national banking association, legal title to land, held by the receiver as an individual, does not pass to his successor by operation of law."
>
> (R. 143, 14 S. E. (2d) 438),

are non-federal questions and the decision upon them is broad enough to maintain the judgment and constitutes a full and final determination of the cause.

(2) Whether the collateral questions discussed in the opinion of the Court (R. 142), but not decided in or referred to in its syllabus, to-wit:

> 1—That the Receiver of The National Bank of Fairmont is without authority to take title by deed to the real estate involved, when and if purchased by him in his fiduciary capacity, unless a trust is created therein in favor of the Bank, and
>
> 2—That the present Receiver, petitioner herein, of The National Bank of Fairmont is without authority to take title to such real estate by operation of law from his deceased predecessor, if any title to the land vested in his predecessor receiver.
>
> (R. 143, 14 S. E. (2d) 438),

are federal questions, and, if found to be federal questions, whether their disposition is necessary or unnecessary for a final determination of the cause.

III.

JURISDICTION

Under Judicial Code (U. S. C. A. Title 28, C. 9, Sec. 344 (b)), providing for the granting of a writ of *certiorari*, it is contended that this Court does not have jurisdiction to review the aforesaid judgment of the Supreme Court of Appeals of West Virginia, because no "title, right, privilege or immunity is specially set up or claimed by either party under * * * any statute of * * * the United States." When the Supreme Court of West Virginia rendered its opinion in these three major particulars, to-wit:

> *First*, "The alienation and transfer of real estate is governed by the law of the state in which the land is located," (R. 146, 14 S. E. (2d) 435),

Second, "In this state it has been held that where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually," (R. 147, 14 S. E. (2d) 438), and

Third, "Upon the death of a receiver of an insolvent national banking association, the legal title to land, held by a receiver as an individual, does not pass to his successor by operation of law," (R. 143, 14 S. E. (2d) 436),

there was eliminated any and all federal questions of substance, (U. S. C. A. Vol. 28, Rule No. 35, p. 424).

The above quoted parts of the Court's opinion definitely decided the chancery cause. They were the three major controversies in the case and, when the Court found under the real property law of West Virginia that "Receiver of The National Bank of Fairmont, an insolvent national banking association," was simply *descriptio personae* of Robert C. Miller, grantee therein, and that the legal title to the land vested in him individually, which as such does not pass to his successor receiver, all other questions raised on the demurrer to the bill of complaint and certified to the Supreme Court of West Virginia became simply collateral matters and any decisions on them simply were tantamount to an *obiter dicta*, and were not necessary to the final determination of the cause.

When the Supreme Court of Appeals of West Virginia definitely decided these three major questions, the subsequent questions raised in the Court's opinion to the effect that—

1—The Receiver of The National Bank of Fairmont is without authority to take title by deed to the real

estate involved, when and if purchased by him in his fiduciary capacity, unless a trust is created therein in favor of the Bank, and

2—The present Receiver, petitioner herein, of The National Bank of Fairmont is without authority to take title to such real estate by operation of law from his deceased predecessor, if any title to such real estate vested in his predecessor receiver,

(R. 143, 14 S. E. (2d) 438),

became decisions on irrelevant and non-essential matters. The Court went out of its way to express its opinion on these two minor points. They neither add to nor subtract from the decision on the three main questions. They lack the force of adjudication.

IV.

SUMMARY OF MATTERS INVOLVED

Petitioner's petition and supporting brief make a fair statement of the matters involved for a writ of *certiorari*, except in one particular. The certified bill of complaint to the State Court in the chancery cause omitted this allegation (R. 169):

"In fact made to said R. C. Miller in his capacity as Receiver of said The National Bank of Fairmont, and which purchase money was in fact paid by said Receiver as such from the funds of said The National Bank of Fairmont,"

which was restored to the record by stipulation (R. 169-170-171). It is conceded that the receiver of an insolvent national bank may, under certain conditions, restrictions and limitations, purchase property at an execution sale out

of the bank's funds for the bank (U. S. C. A. Title 12 of Sections 198, 199 and 200). These sections of the federal statute are cited because it is only by virtue of a compliance with them that Robert C. Miller, Receiver of The National Bank of Fairmont, could have legally purchased the lots in question.

Note the necessary steps to be taken under these sections (U. S. C. A. Title 12, Sections 198, 199 and 200, Appendix pp. 30-31):

1st. The receiver must "find it in his opinion necessary to fully protect and benefit his trust * * *."

2nd. He must certify the facts in the case, together with his opinion as to the value of the equity his trust may have in the same to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of the trust as may be necessary to purchase such property.

3rd. The Comptroller must approve the request and certify the facts and his approval of the request to the Secretary of the Treasury.

4th. The Secretary of the Treasury must approve the request and file all papers relating thereto.

5th. Upon compliance of the foregoing, the Comptroller is authorized with the approval of the Secretary of the Treasury to empower the receiver to make the purchase and pay for the property out of the funds of the bank.

There is not a single allegation in the bill of complaint that any one of these necessary and vital steps was taken or followed by Robert C. Miller, Receiver of The National Bank of Fairmont, in the purchase of these lots.

The State Court in its opinion stated:

> "It does not clearly appear that the purchase price was paid out of funds belonging to the insolvent banking association."

This conclusion of the Court was proper and justifiable when it was so apparent from the record that Robert C. Miller, Receiver of The National Bank of Fairmont, had no direction, authority or power to use the funds of the Bank to purchase these lots. But the pertinent and logical reason for the statement of the State Court that its opinion would not have been influenced to reach a different decision (R. 171), when its attention was called to the fact that there had been omitted from the certified bill of complaint an allegation that the funds of the Bank had been used by R. C. Miller in his fiduciary capacity as Receiver to purchase the lots, is that its decisions on the three major points, to-wit:

> (1) Land titles are governed by the law of the state in which the land is situated;
>
> (2) Where a land conveyance by deed is made to a person whose name is followed by an official title or the name of an office, the title or office is merely *descriptio personae* of the grantee, and title to the land vests in the grantee individually; and
>
> (3) Upon the death of a receiver of an insolvent national banking association, the title to the land, held by the receiver as an individual, does not pass to his successor by operation of law,

definitely settled the instant case and any further consideration of the two minor points became questions of no substance, and any further adjudication of them by the State Court would have been a vain thing. Finality to the cause was achieved, when the three major questions were adjudicated.

V.

DECISION OF SUPREME COURT OF APPEALS OF WEST VIRGINIA

The syllabus of the State Court is the law of the case in West Virginia, whatever may be the reasoning in the opinion. *Kuhn* v. *Coal Company*, 215 U. S. 356. In examining the syllabus in respect to the opinion of the Supreme Court of Appeals of West Virginia, there will be found these three major points of law decided, and no others, to-wit:

> "1. Whether a conveyance of land passes a legal or equitable estate therein is determined by the law of the state where the land is siuated. (R. 143, 14 S. E. (2d) 436).
>
> "2. Where a deed conveyed land to 'R. C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association,' legal title to the land described therein passed to the receiver as an individual. (R. 143, 14 S. E. (2d) 436).
>
> "3. Upon the death of a receiver of an insolvent national banking association, legal title to land, held by the receiver as an individual, does not pass to his successor by operation of law." (R. 143, 14 S. E. (2d) 436).

Under the West Virginia law, the syllabus is the law decided in the cause.

> "* * * Now our constitution requires the court to make the syllabus, and it is that which is the real decision over the opinion."
>
> *Bank* v. *Burdette*, 61 W. Va., p. 637.

"There is no room for doubt as to the scope of the decision in the Griffin case. The syllabus—(p. 480) which in West Virginia is the law of the case, whatever may be the reasoning employed by the opinion of the court—is as follows * * *."

Kuhn v. *Fairmont Coal Co.*, 215 U. S. p. 356.

The State Court in its opinion did not even dignify the two minor questions discussed in its opinion by making reference to them in its syllabus. It is an evident conclusion that the Court did not regard these two minor subjects, to-wit, the legal right of the receiver of a federal bank to take title by deed to land without the creation of a trust therein, or if any title to land did vest in the receiver in his fiduciary capacity, such title did not pass to his successor receiver by operation of law, because when its attention was called to the omission in the certified bill of complaint to the effect that the funds of the Bank had been used by Robert C. Miller in his representative capacity in the purchase of the lots in question, the Court thereupon stated according to the stipulation (R. 170-171):

"* * *; that said President Judge stated to said counsel for plaintiff that said writ would not be issued and that the allegation and words in said bill of complaint hereinbefore quoted and omitted from said transcript of said bill of complaint, even though correctly shown to said Supreme Court of Appeals of the State of West Virginia, to have been a part of said bill of complaint would not influence and would not have influenced said Court to decide said cause in favor of the plaintiff and would not cause and would not have caused said Court to make any opinion or decision in the cause other than that theretofore made; * * *."

Evidently the State Court regarded these two minor subjects not necessary for the final determination of the

cause, and even if they had been entirely omitted from the Court's opinion, the decision on the whole was conclusive and a finality in the determination of the cause.

VI.

ARGUMENT

POINT 1

NON-FEDERAL GROUNDS

This Court has decided that it has no jurisdiction to review by writ of certiorari the decisions of state courts based on non-federal grounds. Where state courts' decisions are based on adequate non-federal grounds, and the state courts have merely formally determined federal questions, which do not appear to be substantial ones, or which are not necessary for the determination of the cause, this Court is without jurisdiction. These non-federal grounds are discussed in order to establish that they involve only non-federal questions.

(A) THESE FOUR (4) DEEDS, EXHIBITS "P," (R. 69), "Q," (R. 72), "R," (R. 75) AND "S," (R. 77), WITH BILL OF COMPLAINT, ARE NOT AMBIGUOUS

Since these deeds are not ambiguous upon their faces, they speak for themselves and no extrinsic evidence is admissible to aid in their interpretation.

No allegations in the certified bill of complaint or the exhibits therewith can change the terms of an unambiguous deed. If the four (4) deeds could be interpreted by the allegations in the bill of complaint and the exhibits therewith, then titles to real estate would be instable, and any deed, however plain, concise, intelligible and unambiguous in its terms, could be changed by apt allegations.

A deed is a contract and is the repose of the final agreement of the parties, and must be interpreted by the Court in accordance with the terms, provisions and conditions thereof, when it is not ambiguous. No extrinsic matter of any kind can be considered in interpreting unambiguous deeds.

Uhl v. Ohio River Railroad Company, 51 W. Va. pp. 106, 107.

Trans. Co. v. *Pipe Line Co.*, 22 W. Va. p. 614.

Griffin v. Coal Co., 59 W. Va. p. 480.

Jones v. *Coal Co.* 79 W. Va. p. 539.

Paxton v. *Oil Co.*, 80 W. Va. pp. 197, 198.

Strother v. Nat'l. Bank, 113 W. Va. pp. 77, 78.

Collins v. *Treat*, 108 W. Va. p. 443.

Williams Pocahontas Coal Co., v. *Berwind Land Co.*, 76 Fed. p. 323.

Trahern v. Woolwine, 109 W. Va. p. 629.

The State Court in its opinion on this subject stated (R. 147, 14 S. E. (2d) 438):

"It is a well established principle of law that a writing, if not ambiguous, speaks for itself. Parol testimony is not admissible to show the intention of the parties making it. *Uhl* v. *Ohio River Railway Co.*, 51 W. Va. 106, 41 S. E. 340; *Collins* v. *Treat*, 108 W. Va. 443, 152 S. E. 205; *Central Trust Co.* v. *Virginia Trust Co.*, 120 W. Va. 23, 197 S. E. 12. Applying this principle to the deeds before us, they alone, construed under the law of this jurisdiction, determine the status of title to the land in question, since no ambiguity appears therein or could be asserted."

(B) WHEREAS CLAUSES IN THE FOUR (4) DEEDS

The whereas clauses contained in each of the four (4) deeds immediately following the caption in each deed are not covenants between the parties; they are simply recitals and these recitals are for the purpose of showing the authority of the Special Commissioner to make and execute such deeds. The Special Commissioner was appointed by the Court and the recitals in the whereas clauses give information as to the authority of the Special Commissioner to convey property described in each deed.

The fact that Robert C. Miller, Receiver of The National Bank of Fairmont, is plaintiff and the Wheelwright Development Company and others are defendants in a certain chancery cause, heretofore pending in the Circuit Court of Marion County, West Virginia, wherein the Special Commissioner is authorized to sell and convey the real estate involved herein, presents no factual justification whatsoever that Robert C. Miller purchased and took title to the property in each deed in his fiduciary capacity. The fact that Robert C. Miller is acting in his fiduciary capacity as a plaintiff in such chancery cause under which the real estate was sold and conveyed by the Special Commissioner is not a *fortiori* that the Court should conclude that, because Robert C. Miller in his fiduciary capacity acted as plaintiff in such chancery cause, Robert C. Miller, Receiver of The National Bank of Fairmont, as grantee, in each deed, therefore, took title in his fiduciary capacity; such, however, might be good evidence in establishing a trust for the benefit of the Bank.

The fact that Robert C. Miller, Receiver of The National Bank of Fairmont, bid and purchased the property for $2,000.00 in the deed, Exhibit "S," (R. 77), for example, does not show that he received the property by deed of

conveyance in his fiduciary capacity. The fact is that, when the Receiver of The National Bank purchased the property for $2,000.00, the proper conveyance should have been to The National Bank of Fairmont, and again in the second whereas clause, where it states "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association," purchased the property for the sum of $2,000.00, the words "Receiver of the National Bank of Fairmont," are again simply descriptive of the purchaser, Robert C. Miller.

(C) THE VICE OF THE FOUR (4) DEEDS

The grantee in each of the four (4) deeds, Exhibits "P," (R. 69), "Q," (R. 72), "R," (R. 75) and "S," (R. 77), should have been The National Bank of Fairmont, a national banking association. It was error to endeavor to convey the real estate involved in this proceeding to Robert C. Miller, Receiver of The National Bank of Fairmont. If the conveyances had been made to the corporate closed Bank, then the title to the real estate would have been vested in the Bank, and thereby would have been an asset of the closed Bank to be administered by its receiver. The decision of the State Court establishes legal title in Robert C. Miller, individually, and the argument is untenable that the land involved is an asset of the Bank. The lots in question can never become an asset of the Bank, until a trust is established for the benefit of the Bank, and the receiver of the Bank will then have the right to administer them as an asset. The vice of these transactions can now only be cured by a proper chancery cause to establish a trust for the benefit of the closed Bank.

Wittnebel v. *Loughman*, 80 Fed. (2d Series), p. 224; 9 F. Supp. p. 467.

The State Court made this conclusion in its opinion (R. 146, 14 S. E. (2d) 438):

> "An insolvent national bank does not lose its corporate identity by the appointment of a receiver. The *First National Bank of Bethel* v. *The National Pahquioque Bank*, 14 Wall 383, 20 L. Ed. 840. It may still enter into transactions not forbidden by law. 'It is clearly, we think, the intention of the law, that it should continue to exist as a person in law * * *.' *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1, 40 L. Ed. 595, 16 Sup. Ct. 439; *Hiatt* v. *Warren* (5 C. C. A.) 44 Fed. (2d) 313; *Neely v. Planters National Bank of Clarksdale, Miss.*, 48 Fed. (2d) 266. * * *"

(D) THE PHRASE, "RECEIVER OF THE NATIONAL BANK OF FAIRMONT," IS SIMPLY *DESCRIPTIO PERSONAE* OF THE GRANTEE

In each of the four (4) deeds, the grantee is "Robert C. Miller, Receiver of The National Bank of Fairmont." The phrase, "The Receiver of The National Bank of Fairmont," is simply a descriptive phrase. These words are merely *descriptio personae* and serve no other purpose. In the case of *Hyman* v. *Swint*, 94 W. Va. 627, Syllabus 1 thereof announces the law as to the legal title:

> "Where property is conveyed to one whose name in the deed is followed simply by his official title or name in office, the legal title vests in him individually."

In the remaining part of the same syllabus the law as to the equitable title is also stated:

> "And in the absence of evidence to the contrary, and if no trust appears to have been created by the deed, the grantee also acquires the equitable title."

Under the four (4) deeds, Robert C. Miller acquired the legal title individually, and there being nothing upon the face of the deeds to the contrary and no trust having been created by these deeds, Robert C. Miller also acquired the equitable title, unless a trust can be established for the benefit of the Bank by extrinsic evidence.

Donahue v. *Rafferty*, 82 W. Va. p. 535.

Trust Co. v. *Crawford & Ashby*, 69 W. Va. p. 115.

18 *C. J., Chapter VI, Sec.* 240, pp. 275, 276.

Thompson & Lively v. *Mann*, 53 W. Va. pp. 435, 436.

Hanson v. *Blake, Adm'r.*, 63 W. Va. pp. 560, 561, 562.

Greenfield v. *Stout*, 50 S. E. p. 112.

Hart et al. v. *Seymour et al.*, 35 N. E. 246.

Fowler et al. v. *Coates et al.*, 94 N. E. 997.

Kanenbly et al v. *Volkenberg et al.*, 75 N. Y. S. p. 8.

Title Guarantee & Trust Co. v. *Fallon et al.*, 91 N. Y. S. 497.

Barker v. *Temple Lumber Co.* 12 S. W. (2d) 180.

State v. *Gray*, 111 So. 243.

Love v. *Love et al.*, 83 Pac. 201.

Sansom v. *Ayer & Lord Tie Co.* 139 S. W. 778.

Pfeiffer v. *Rheinfrank*, 2 App. Div. pp. 574, 575, 576; 37 NYS, 1076, 1077, 1078.

Turn the facts around in the instant case and apply them to The National Bank of Fairmont, when it was solvent. Suppose that Mr. M. L. Hutchinson, President of The National Bank of Fairmont, had purchased these lots in question from the Special Commissioner and took title thereto as grantee in this language:

> "M. L. Hutchinson, President of The National Bank of Fairmont, a national banking association."

There is no question that Mr. Hutchinson as such President would have the right to purchase these lots for the Bank, but the fact that he made the purchase would not justify his taking title to the lots in his own name followed by his official title in the Bank. The words "President of The National Bank of Fairmont" would not justify an inference or an implication that a trust was created in these deeds. Under these circumstances, no argument can be advanced justifying that title passed to Mr. Hutchinson in his official capacity. It is obvious that the title passed to Mr. Hutchinson individually, and that the descriptive words following his name are simply *descriptio personae.*

Greenfield v. *Stout*, 50 S. E. p. 112.

The phrase, "Robert C. Miller, Receiver of The National Bank of Fairmont," as grantee in each of the four (4) deeds, would occupy the same legal position as the phrase "M. L. Hutchinson, President of The National Bank of Fairmont," as grantee in the same deeds.

The property right law announced in the two principal cases of *Donahue* v. *Rafferty, supra,* and *Hyman* v. *Swint, supra,* to the effect that words designating the official capacity of the grantee in a deed are only *descriptio personae,* if no trust has been created by the deed, prevails rather universally throughout the states.

Land titles should be left secure as they now exist under property right laws established by the West Virginia Supreme Court in its decisions, which have become *stare decisis*, like the cases of—

Donahue v. *Rafferty, supra,* and *Hyman* v. *Swint, supra.*

The State Court in the instant case dealt with this subject in its opinion briefly and convincingly in this language (R. 147, 14 S. E. (2d) 438):

> "In this state it has been held that where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually. *Hyman* v. *Swint*, 94 W. Va. 627, 119 S. E. 866; *Donahue* v. *Rafferty*, 82 W. Va. 535, 96 S. E. 935. See also, *Pfeiffer* v. *Rheinfrank*, 37 N. Y. S. 1076. We see no reason to change the rule announced in the cases of *Hyman* v. *Swint* and *Donahue* v. *Rafferty*, supra."

(E) THE LAW OF THE SITUS OF REAL PROPERTY, *LEX REI SITAE*, DETERMINES THE VALIDITY OF THE CONVEYANCES THEREOF, WHEREVER MADE

No title will pass and no interest will arise in West Virginia, except as the law, statutory or otherwise, prescribes in that State. The doctrine is well settled that the alienation and transfer of real estate is governed by the law of the state in which the land is situated. This particular part of the opinion of the Supreme Court of Appeals of West Virginia in the instant case (R. 146-147, 14 S. E. (2d) 438) in respect to the conveyance of real estate is pertinent and argues convincingly on this proposition, to-wit:

"However, another question now arises: Does the law of this jurisdiction apply in the construction of a deed conveying land to the receiver of a national bank? It seems that the answer to this question is largely determinative of the result herein. The alienation and transfer of real estate is governed by the law of the state in which the land is located. Olmsted v. Olmsted, 216 U. S. 386, 54 L. Ed. 530, 30 S. Ct. 292, 25 L. R. A. N. S., 1292; In re Barnett, 2 Cir., 12 F. 2d 73; Irving Trust Co. v. Maryland Casualty Co., 2 Cir., 83 F. 2d 168, 111 A. L. R. 781. 'The nature of the interest created by the conveyance is determined by the law of the state where the land is situated.' Restatement of the law, Conflict of Laws, Section 221. Generally, as to the legal effect and interpretation of words used in an instrument conveying land, see Conflict of Laws, supra, Section 214 et seq. It is no longer open to question that the legal effect and interpretation of words used in an instrument conveying land situate in this state are to be measured by the laws of this jurisdiction. Klinck v. Price, 4 W. Va. 4, 6 Am. Rep. 268. This principle is recognized and discussed in the case of Wick v. Dawson, 42 W. Va. 43, 24 S. E. 587. This being true, we look to the laws of this state to determine what title Miller took by the conveyance to him as 'receiver of The National Bank of Fairmont, an insolvent National Banking Association.' "

The subjects under the headings "(A)," "(B)," "(C)," "(D)" and "(E)" hereunder have been discussed in order to show their jural character; that they are not in any sense federal questions; and that they involve purely non-federal grounds adequate and broad enough to sustain the decision as a whole. The instant case involves three major non-federal questions and two other collateral questions, and the non-federal questions decided are severable from, and independent of, the two collateral questions, claimed by petitioner to be federal questions.

Since land titles are determined by the law of the state in which the land is situated, and also since the law of the *situs* determines the validity of the conveyances wherever

made (*Irving Trust Co.*, v. *Maryland Casualty Co.* et al, 84 Fed. R. 168), it logically follows that the judgment of the Supreme Court of Appeals of West Virginia (R. 142) should prevail, because its decision, made purely upon non-federal grounds in respect to the four (4) deeds and the conveyances thereunder, is tantamount to a full and complete determination of the cause.

White v. *Leovy*, Vol. 174 U. S., pp. 95, 96.
Ayres v.*Polsdorfer*, Vol. 187 U. S., p. 584.

Respondent contends that it is settled law that, where the judgment of a state court is predicated upon non-federal and federal grounds, and the non-federal grounds are severable from, and independent of, the federal grounds, and are broad enough to sustain the judgment, this Court will not grant a writ of *certiorari* to review such judgment.

Doyle v. *Atwell*, 261 U. S., p. 592.

Fox Film Corp., v. *Muller*, 296 U. S., pp. 209, 210.

United States v. *Hastings*, 296 U. S., p. 188.

Honeyman v. *Hanan*, 300 U. S., p. 14.

Johnson v. *Risk*, 137 U. S., p. 300.

Adams v. *Russell*, 229 U. S., pp. 358, 359.

McCoy v. *Shaw*, 277 U. S., p. 303.

Ancient Egyptian Order v. *Michaux*, 279 U. S., pp. 744, 745.

POINT 2

FEDERAL GROUNDS

Petitioner claims that these two federal questions are involved in this case:

> One, whether the receiver of a national bank can take title to land by deed without there being created therein a trust for the benefit of the bank as provided under the West Virginia law. *Hyman* v. *Swint, supra*, and *Donahue* v. *Rafferty, supra*, and
>
> Another, whether the present receiver can legally take title to such land by operation of law from a deceased predecessor receiver, if any title to the land vested in such predecessor.

Generally speaking, national banks are subject to non-discriminatory state laws, and especially so in respect to the alienation and transfer of real estate. There would appear to be no conflict between the laws of West Virginia and the asserted right of a receiver of a federal bank to take title to land by deed, when there is created in such deed a trust for the benefit of the bank under Hyman v. Swint, supra, and Donahue v. Rafferty, supra. If no title to the land vests in the receiver of the national bank, because no trust is created in the deed under Hyman v. Swint, supra, and Donahue v. Rafferty, supra, then the second proposition of whether any title in the deceased predecessor receiver vests in the successor receiver by operation of law becomes a moot question.

The whole controversy has arisen in this cause, first by the failure to convey the lots in question to the corporate entity, The National Bank of Fairmont, and when this first error was made, then second, by the failure to create in the four (4) deeds, Exhibits "P," "Q," "R" and "S," a

trust for the benefit of the Bank. No trust being created in these deeds, the title to the lots, under the doctrine of *descriptio personae* of the grantee, was vested individually in Robert C. Miller.

It is again stressed that the acquisition and transfer of real estate is governed by the law of the state in which the real estate is situated, and there is quoted for convenience, an extract from the case of *Nagle* v. *Herold*, 30 F. Supp. 905, in support of this law and therein is a long line of cases cited supporting this law, to-wit:

> "The Seneca National Bank of West Seneca is a national bank. Insofar as its contracts are concerned it is subject to the laws of the State of New York, in which is located. 'National banks "are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than the nation. All their contracts are governed and construed by state laws. *Their acquisition and transfer of property*, their right to collect their debts, and their liability to be sued for debts, are all based on state law. * * *" (*First*) *National Bank* v. *Commonwealth* (*of Kentucky*), 9 Wall. (353), 362 (19 L. Ed. 701).' *McClellan* v. *Chipman*, 164 U. S. 347, 356, 17 S. Ct. 85, 87, 41 L. Ed. 461; *First National Bank* v. *State of Missouri*, 263 U. S. 640, 656, 44 S. Ct. 213, 68 L. Ed. 486. See, also, *Lewis, Rec'r.* v. *Fidelity & Deposit Co. of Maryland*, 292 U. S. 559, 54 S. Ct. 848, 78 L. Ed. 1425, 92 A. L. R. 794."
>
> (Italics Ours)

The case above referred to, *National Bank* v. *Commonwealth*, 9 Wall. 353, 362, (1869), is the early and principal case on this subject and it states the extent that state laws govern national banks:

> "They (national banks) are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the

> nation. All their contracts are governed and construed by State laws. *Their acquisition and transfer of property*, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."
>
> (Italics Ours)

The National Banking Act makes no provision for the receiver of a national bank to take title by deed to real estate purchased by him. The Act makes detail provision for the receiver under certain terms, conditions and limitations to purchase real estate at execution sale with bank funds for the benefit of the bank (U. S. C. A. Title 12 of Sections 198, 199 and 200), and if the Act had contemplated that such receiver take title to real estate so purchased, necessarily the Act would have made apt provision for the receiver to hold title to such real estate and to convey the same under certain defined terms, provisions and conditions. Likewise the Act does not specify in any specific terms the extent to which a successor receiver may take title to real estate, if any could be held by his predecessor receiver. In the instant case, these questions are determined by the laws of West Virginia as enunciated by its Supreme Court.

Abilene National Bank v. *Dolly, Com'r.* 179 Fed. 461; 32 L. R. A. (N. S.) p. 1065.

POINT 3

THE CHANCERY CAUSE PRESENTS A CASE FOR THE ESTABLISHMENT OF A TRUST FOR THE BENEFIT OF THE BANK

The transactions recited in the allegations of the bill of complaint in this chancery cause are persuasive of a trust

in favor of the closed federal Bank under the laws of West Virginia. The remedy is the institution of a new chancery cause or amendment to the original bill of complaint in the old cause for the establishment of a trust in favor of The National Bank of Fairmont, if the Bank's funds were used in the purchase of the lots, and then have the trial Court make disposition thereof according to the state laws.

Obviously, one of the ostensible purposes of this chancery cause is to quiet title. The quieting of title may be only incidental to its main purpose, which is primarily to enforce compliance with the purchase agreement (Exhibit "T" with the bill of complaint, R. 80):

> " * * * But it is nevertheless a rule of these and other cases that where the plaintiff, either in or out of possession, has some equitable right not redressable in a court of law, and removal of cloud is only incidental to the primary relief sought, the bill may be maintained."

Swick v. *Rease*, 62 W. Va. 560.

Under this procedure, the remedy of the Bank would be sure, complete and effective under the general laws of West Virginia and its Official Code 36-1-4.

Upon consideration of the whole case and the record thereof, there appears to have been adequate remedy under the laws of the State of West Virginia for a full determination o fthis case (R. 143, 14 S. E. (2d) 438), and to give the petitioner satisfactory and full relief without incapacitating The National Bank of Fairmont or its Receiver in the discharge of their duties, or destroying their efficiency as federal agencies.

The application of the laws of the State of West Virginia to the present case and the power of that State to enforce them are established in its decision (R. 143, 14 S. E. (2d) 438). The nature of the remedy to be employed by petitioner for the establishment of a trust is also for that State's determination under its laws.

First National Bank in St. Louis, v. *State of Missouri*, 263 U. S. 640.

POINT 4

THE CASE DETERMINED ON CERTIFIED RECORD

Petitioner declares in his supporting brief that it has been the settled practice of the Comptroller of the Currency to take title to real estate by deeds in the name of the receiver in his fiduciary capacity rather than in the name of the bank as a corporation, and then argues that, under *Kennedy* v. *Gibson et al.*, 8 Wall. 498, 506, the receiver is simply an assignee of the bank. The fallacy of this argument is that that case was decided upon the question of the institution of suits for the benefit of the closed federal bank. There can be no assets of a bank, until the bank acquires title thereto. The fact is under the later decisions of this Court, the receiver of an insolvent national bank is defined to be an officer of the executive branch of the government, a creature of the federal statute with prescribed and limited powers, and an agent of the closed federal bank for the purpose of dealing with the bank's assets in behalf of its creditors and stockholders. It is hardly within the province of the Receiver of The National Bank of Fairmont acting as its agent to take title to real estate without the creation of a trust therein contrary to laws of West Virginia.

U. S. C. A. Title 12, Sections 191, 192.

U. S. C. A. Title 12, Sections 198, 199 and 200.

Whelan v. *Blankenbeckler*, 87 F. (2d), 82.

District of Columbia v. *Wardell*, 32 F. Supp. 771.

Schofield v. *Baker*, 212 Fed. p. 504.

If title to land is conveyed by deed to the Receiver of The National Bank of Fairmont in his fiduciary capacity, then the deed must set up a trust for the benefit of the Bank, *Hyman* v. *Swint*, *supra*, and *Donahue* v. *Rafferty*, *supra*. Titles to real estate should be stable and should not stand on the insecure foundation of a mere practice of the Comptroller of the Currency. Land titles under state laws as applied by appellate state courts should be unchangeable, whatever the practice of the Comptroller may be. The record is silent on any practice of the Comptroller in respect to his authorizing deeds for real estate to be taken by his receiver in his fiduciary capacity. This issue could hardly be raised now collaterally, when there is no certified record to support such practice.

VII.

GROUNDS RELIED UPON FOR DISALLOWANCE OF WRIT

The writ of *certiorari* should be denied for these reasons:

(a) Alienation and transfer of real estate are governed by the law of the state in which the land is situated.

(b) This Court is without jurisdiction to review decisions of state courts based on non-federal grounds.

(c) There are no federal questions of substance involved necessary to the determination of the cause.

(d) The judgment of the Supreme Court of West Virginia is adequate and broad enough to sustain the decision, exclusive of the decision on any federal questions.

(e) The non-federal questions are independent of, and severable from, any federal questions asserted.

(f) The claimed federal questions are collateral and subordinate to the three major non-federal questions and are not of sufficient dignity and substance to be considered with a view to reversing the decision of the State Court.

(g) The State Court's decision is based on adequate non-federal grounds and the State Court has merely formally determined the federal questions, which are unsubstantial and unnecessary to the determination of the cause. (*Honeyman* v. *Hanan*, 300 U. S. 14.)

(h) The decision of the State Court on the alleged federal questions does not incapacitate federal banks and their receivers in the discharge of their duties or destroy their efficiency as federal agencies. They should keep and observe state laws in the acquisition and transfer of their property.

(i) There is adequate relief to the petitioner in a chancery cause under the laws of West Virginia to establish a trust for the benefit of The National Bank of Fairmont, if and when it is shown that the Bank's funds were used in the purchase of the lots in question. It is obvious that the decision of the State Court plainly indicates such procedure.

(j) The alleged practice of the Comptroller of the Currency to take title to real estate by deeds in the

name of the receiver in his fiduciary capacity rather than in the name of the bank as a corporation is not involved in the case, since there is no certified record supporting such claim. There is no proof in the record of long continued practice with the knowledge of the Comptroller of the Currency of the execution of receivers' deeds without the creation of a trust therein for the banks. (*Inland Waterways Corporation* v. *Young*, 60 S. C. R. 646, 647; 309 U. S. 517). However, illegality cannot attain legitimacy through practice.

(k) For other reasons apparent upon the face of the certified record of the case.

CONCLUSION

This case does not raise questions of special gravity or general importance.

When all is said and done and this argument is finally concluded, there remain two differences between the contention of the petitioner and the contention of respondent. Petitioner claims that a receiver of a federal bank has the right to take title to land by deed in his fiduciary capacity, contrary to the doctrine of *descriptio personae* of the grantee, (West Virginia Official Code 36-1-11, Appendix 31), and respondent says no, unless a trust for the benefit of the bank is created in such deed. The other difference rests upon a condition. If it is adjudged that a receiver of a national bank has unconditionally the authority to take title to real estate by deed in his fiduciary capacity, then the question arises whether a successor receiver can take title to such real estate by operation of law from a predecessor receiver, and to this proposition respondent says no, unless in the first instance, when such real estate was conveyed by deed to the predecessor receiver, a trust was created therein for the benefit of the

bank. (West Virginia Official Code 36-1-17, Appendix 32). In the last analysis, the simple difference, therefore, between petitioner and respondent is the form of the deed to the receiver. Respondent asserts there should be a covenant in the deed creating a trust for the benefit of the bank, and petitioner urges that no such covenant is necessary under the practice of the Comptroller of the Currency, but there is no certified record in the case in support of any such practice, (U. S. C. A. Title 28, Supreme Court Rules, Section 7 of Rule 11, appended on pages 400-401 thereof), and this question of practice, or any question of practice, by the Comptroller, was not raised before or passed upon by the State Court.

It seems quite obvious that title to real estate purchased by a receiver of a federal insolvent bank out of bank's funds should be taken in the corporate name of the bank, and thereby entirely eliminate all controversies in respect to a federal bank receiver taking title to land by deed and transfr of any such title from a predecessor receiver to a successor receiver by operation of law.

The petitioner has a clear and adequate remedy in chancery for relief in the establishment of a trust for the benefit of his Bank.

Petitioner expresses an apprehension that, if the judgment of the Court below is permitted to stand, where land titles to real estate are acquired by federal bank receivers in their fiduciary capacity and sold by them as such receivers, such judgment will cast doubt upon their stability. The certified record supports no such claim and is silent on this question. However, it is apparent that land titles, if any, disquieted by the judgment of the State Court, will hardly be comparable to the titles unsettled by reversing the property rights law of West Virginia established in these two principal cases, *Donahue*

v. *Rafferty, supra, and Hyman* v. *Swint, supra.* No doubt, many titles are now predicated and held upon the Donahue and Swint cases, supra, and now to overrule these two cases would project a disturbing factor into future litigation and the security of land titles in West Virginia.

The petition for writ of *certiorari* should be denied.

Respectfully submitted,

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and
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Fairmont Supply Company,
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Dated at Fairmont, W. Va.
October 21, 1941.